IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

CIVIL SECOND APPEAL No. 133 of 1986

DEEN DAYAL & ORS.
V/S
SMT. DHAPU & ORS.

Mr. PAWAN OJHA for Mr. SG OJHA, for the appellant / petitioner

Mr. RR NAGORI, for the respondent

Date of Order : 1.9.2006

HON'BLE SHRI N P GUPTA,J.

ORDER

This appeal has been filed by the defendants Deen Dayal and Bhanwar against the impugned judgment and decree of the learned lower Appellate court dt. 11.2.1986, decreeing the plaintiff's suit, holding the gift deed dt. 16.1.67 to be void and ineffective, to the extent of 1/4th share of the plaintiff, and also issuing consequential injunction.

It was pointed out by the learned counsel for the respondents that respondent no. 1 and 2 have already expired. Thereupon the learned counsel for the appellant filed an application, alleging that Dhapu has expired on 24.3.1994, and respondent no. 2 has expired long back i.e. 10 years ago, and that respondent no.1 Dhapu was survived by the remaining respondents only, being Suraj and Sohani and, it was prayed that the respondents no. 3 and 4 be

taken to be legal representatives of Dhapu, and as against Sayar the appeal be ordered to be dismissed as abated. This application is not seriously opposed, as such the same is allowed, name of the deceased Dhapu is struck off, and in her place the respondent no. 3 and 4 are taken to be her legal representatives, and as against Sayar the appeal is dismissed as abated.

Thereafter I have heard learned counsel for the parties on merits of the appeal.

The facts of the case are, that the plaintiff Dhapu filed a suit for cancellation of gift deed, alleging interalia, that the plaintiff is the widow of Bhoma, and defendants no. 2, 3 and 4 are her daughters. Bhoma is said to have expired on 22.9.65, and on his death plaintiff, and defendants no. 2 to 4 succeed to his property in the share of 1/4th each. It was then alleged, that Bhoma had executed adoption deed on 31.5.64, in favour of one Kalu, and on coming to know all that, she has filed a suit, in the Court of Civil Judge, Merta for its cancellation, on 31.3.1966, which has been decreed on 20.3.1968. It was then alleged, that the plaintiff being illiterate widow and mentally weak, while defendant no. 1 is the son of her husband's younger brother, got engaged Shri Rama Krishan Verma, in the said litigation of cancellation of adoption, and persuaded her to execute power of attorney, and under that pretext, got gift deed executed, and registered, and

continued to conduct the suit for cancellation of adoption, as power of attorney. It was then alleged that it was on 20.10.1970, when the defendant no. 5 started telling Patwari to enter his name in Girdwari, that the plaintiff got suspicions, and found out from Degana, and the things were unearthed. It was also alleged, that thereafter the defendant no. 5 physically misbehaved with the plaintiff. Thus, it was alleged, that the gift deed was got executed by fraud and misrepresentation, and it has not been acted upon, and it is void ab-initio. Interalia with these allegations it was prayed, that the gift deed be set aside, to the extent of share of the plaintiff, and injunction was also prayed.

The written statement was separately filed by defendant no. 1 and 5, contesting the plaint's allegation, and pleading, that the gift was executed with consent of the three daughters, and he is maintaining the plaintiff, she voluntarily executed the gift deed, and got it registered, and that he had not played any fraud. It was pleaded, that since the plaintiff has voluntarily executed the gift deed, and got it registered, and she also gave statement in the Panchayat, to support the mutation, she is estopped from assailing the gift deed. It was also pleaded, that the plaintiff had sold one field to Sugana, who was the father of Kalu, mentioned above, and the entire litigation was conducted from the funds of the contesting defendants. Various other pleadings were taken, like,

sufficiency of court fees, and limitation. The remaining defendants also filed a separate written statement, pleading, that they have already filed a separate suit for cancellation of the gift deed, in the Court of Munsiff, being Suit No. 223/1971, and it was prayed, that the suit be dismissed.

Learned trial court found the plaintiff to have failed to establish any fraud, and thus deciding all material issues against the plaintiff, dismissed the suit.

Learned Lower Appellate Court reversed the finding on issues no. 1, 2, 3, 4, 7, 8, 10 and 11, by formulating six questions, as were argued before the learned lower Appellate Court, on behalf of the plaintiff. The questions framed were, as to whether the learned trial court has not properly appreciated the evidence about the fraud, in getting executed the gift deed? Then other questions were, about limitation, sufficiency of court fees, estoppel against the plaintiff in challenging the gift deed, suit being triable by Revenue Court, and as to whether the gift deed can be partly assailed?

Deciding the first question about gift deed having been got executed under fraud, the learned lower Appellate Court considered this aspect, while considering the first question, and found that gift deed was got executed under fraud, and by practicing deception. Then it was found, that

the suit has been filed within limitation, from the date of coming to know of the gift deed, thus the suit was found to have been filed within limitation. Then considering the fact, that challenge was made to her share, to the extent of 1/4th, the court fee was found to be sufficient. Then, it was also found, that since the plaintiff had only 1/4th share, it was found that she can legitimately get the gift deed set aside to the extent of her share only. Interalia with these findings, the impugned decree has been passed, declaring the gift, to the extent of the plaintiff's 1/4th share, to be void.

This appeal was admitted on 4.9.1986, by framing two substantial questions of law; one being, as to whether the suit was within limitation, and the other being, whether the finding that the document was executed on account of fraud is based merely on conjectures and surmises.

I have heard learned counsel for the parties, and have gone through the entire record closely.

Taking up the first question about limitation, the learned trial court decided this controversy, while deciding issue no. 2, by simply holding, that since no fraud was practiced, it cannot be said that the plaintiff came to know about this fraud on 10.10.1970, and thus the suit was held to be barred by limitation. As against this,

the learned lower Appellate Court has considered the aspect of fraud, thread bare, and has found the gift deed, to have been got executed by fraud, and has also found, that the plaintiff learnt about the fraud on 10.10.70 only, and thus the suit has been found to be within limitation.

In my view, the decision of this question depends, basically on the question, as to whether the gift deed was got executed by practicing fraud, or it was voluntarily executed by the plaintiff, because if it was voluntarily executed by the plaintiff, then obviously, it could not be assailed after expiry of three years, and if it is found to have been executed by fraud, then obviously, limitation would start only when the fraud came to the knowledge of the plaintiff. Therefore, I stand better advised to concentrate first, on the second question.

Thus, coming to the second question, a look at the judgment of learned lower Appellate Court shows, that the learned Judge has considered the material, placed on record on the side of the plaintiff, about the defendant no. 5 being conducting the litigation, about cancellation of adoption deed, on behalf of the plaintiff, and in the garb of getting executed the power of attorney, got executed the gift deed. Then, the plaintiff has clearly denied to have purchased the stamps, and to have given the statements alleged to have been given in Panchayat. Then, it has also been considered, that the witnesses, attesting gift deed,

are unknown to the plaintiff, and that the gift deed was not registered for two months, for which there is no explanation on the side of the contesting defendants. Then, another circumstance, which has been considered is, that after this gift deed, the plaintiff executed sale deed in favour of Sugana, being Ex. 1, and in that sale deed, there is no recital about the gift deed, and that sale deed is signed by the defendant no. 5, Bhanwarlal, which clearly shows, that had Bhanwarlal got the gift deed executed from the plaintiff consciously, then there remained no property with the plaintiff, capable of being sold to Sugana, as admittedly, the entire property of Bhoma, comprised of the property, covered by gift deed only.

I have gone through the entire evidence of the parties, and find myself one with the findings recorded by the learned lower Appellate court. I need not repeat all the reasons given by the learned lower Appellate Court. However, it is very significant to note, that admittedly, the entire property, left by Bhoma, is the subject matter of gift deed in favour of defendant no.1, which was got executed by defendant no.5, and admittedly, the plaintiff has executed sale deed of part of the property, in favour of Sugana, much after execution of the gift deed, and admittedly, defendant no. 5 has signed that sale deed, and therein there is no recital about any gift deed having been made. Even this by itself is a million dollar circumstance to show, that the contesting defendants got the gift deed

executed clandestinely, and kept the things secret, to the extent, that even the plaintiff was allowed to alienate the property as a full owner, notwithstanding the execution of the gift deed. In that view of the matter, finding recorded by the learned lower Appellate Court, on question no. 1, does not require any interference, and cannot be said to be arrived at, merely by conjectures and surmises. Thus the question no.2 is required to be, and is, answered against the appellant.

Consequently, the question no.1 is required to be and is answered against the appellant.

Thus, the appeal has no force, and is hereby dismissed. Parties shall bear their own costs.

(N P GUPTA),J.

/Sushil/